FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 3, 10, and 71

MAURICE E. TRAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE PETITIONER

TAYLOR, SCOLL, FERENCZ & SIMON
400 Madison Avenue
New York 17, N. Y.
NATHAN WITT
P. O. Box 156
New York 23, N. Y.
Attorneys for Petitioner.

TELFORD TAYLOR,
NATHAN WITT,
KENNETH SIMON,
Of Counsel.

INDEX

CASES CITED

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

MAURICE E. TRAVIS, *Petitioner*, v. UNITED STATES OF AMERICA	Nos. 3, 10, and 71

REPLY BRIEF FOR THE PETITIONER

The principal purpose of this reply brief is to correct several mis-statements of the record, which are important because the government's legal arguments are largely based on these erroneous factual premises. There are also a few legal issues—in particular the initial and, in our view, decisive question of venue—which call for further comment.

I. *Venue.* The government concedes (G. Br. p. 42)[1] that the offense with which petitioner is charged was "completed in the District of Columbia" by the filing of the affidavits at the main office of the National Labor Relations Board. It also concedes (*ibid.*) that the District of Columbia was "the prescribed place of filing in the case of officers of international unions" such as the petitioner.

[1]References to the government's brief are given as above ("G. Br."), to the petitioner's brief as "P. Br.", to the printed record (in No. 10 unless otherwise indicated) as "R.", and to the transcript as "Tr."

From all this it follows that the government's effort to sustain venue in Colorado under the "continuing offense" statute (18 U. S. C. 3237) must fail. Whatever weight might in other circumstances be given to the government's argument that the offense was "begun" in Colorado by mailing the affidavits, that view cannot prevail here, since the place of filing is prescribed by law as the District of Columbia. That being so, there is venue only at the prescribed place of filing. *United States* v. *Lombardo*, 241 U. S. 73, 77-78.[2]

Since the principle of the *Lombardo* and other cases[3] is plainly governing here, the government chooses to ignore it.[4] Consequently, the lower court cases relied on by the government are not in point, since in them the place of filing was not prescribed by law.[5] For the same reason,

---

[2]The government endeavors to deflect the *Lombardo* case (G. Br. pp. 32 and 43) by omitting the crucial portion of the opinion. Of course, the Court's opinion does include the comments quoted in the government's brief about "a continuously moving act", but these are immediately followed by the statement that those comments are "not applicable where there is a place explicitly designated by law", as there was in the *Lombardo* case and as there is in the present case.

[3]Cited in P. Br. pp. 25-26.

[4]With the possible exception of the last paragraph of a footnote (G. Br. p. 46 fn. 16) there is no reference at all to the governing principle that where the place of filing is fixed by law, there is venue at that place only. The distinction suggested by the government between a failure to file and a false filing is discussed in P. Br. pp. 25-26. In *Bowles* v. *United States*, 73 F. 2d 772, contrary to the government's statement, a false return was involved in the third and fourth counts of the indictment.

[5]As was pointed out in P. Br. p. 26, no place of filing was prescribed either in *De Rosier* v. *United States*, 218 F. 2d 420, or *Bridgeman* v. *United States*, 140 Fed. 577, the two cases on which the government chiefly relies (G. Br. pp. 43-44). Of the other decisions cited by the government (G. Br. 44-45), five are cases where the statute explicitly punished acts other than filing or receipt. *Burton* v. *United States*, 202 U. S. 344 (agreeing to receive unlawful compensation; compare the earlier decision in the same case, 196 U. S. 283, and see P. Br. pp. 16 fn. 16 and 20 fn. 25); *Ex parte Shaffenberg*, Fed. Cas. No. 12,696 ("making" as explicitly distinguished from "presenting" a false claim); *United States* v. *Uram*,

the government's argument (G. Br. p. 42) that petitioner's affidavits were "irrevocably placed in the United States mails" in Colorado is irrelevant.[6] Petitioner's policy arguments in support of the established rule (P. Br. pp. 27-29) are greeted with silence.

II. *Grand Jury Testimony.* The government disputes (G. Br. pp. 73-74) petitioner's statement (P. Br. p. 32) that "the trial judge sustained the prosecution's objections to questions put by the defense . . . to the prosecution witnesses, the purpose of which was to ascertain whether or not they had testified to the grand jury with respect to particular episodes which they testified about at the trial . . .". Cross-examining the witness Mason, the defense asked (R. 686) whether he had testified before the grand jury "about any of these conversations with Travis that you testified on direct examination here last week?" The trial court sustained the prosecution's general objection (not, as the government states, limited to "form, scope or

148 F. 2d 187 (conspiracy to make a false housing application properly prosecuted where both the agreement and the overt acts occurred); *United States* v. *Downey*, 257 Fed. 366 (fraudulently procuring reward for apprehension of deserter); *United States* v. *Newton*, 68 F. Supp. 952, aff'd 162 F. 2d 795 (prosecution not for filing but for assisting in the preparation of a false income tax return, rightly brought where the return was prepared; dictum at p. 955 that if offense were false filing it would be indictable only at place of filing). The other two cases (*In re Palliser*, 136 U. S. 257, and *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267) are sufficiently discussed in P. Br. pp. 17, 20 fn. 25, 24 fn. 34, and 27 fn. 40.

[6]The "irrevocable" argument would have required a contrary result in *Burton* v. *United States*, 196 U. S. 283, as well as in the *Bowles* case (*supra*, note 4) and comparable decisions cited in P. Br. pp. 25-26. As a matter of logic, a failure to file at all is even more "irrevocable" than the dispatching of a false document. In fact, the mailing of petitioner's affidavit was not "irrevocable"; quite apart from the hazard of loss in the mails, petitioner or his union might have telephoned or telegraphed the Board while the affidavits were in transit, to withdraw the request for compliance status and request that the affidavits be disregarded and returned, instead of being filed.

purpose") and ruled (R. 687) that the defense could not go into "the subject matter" of the witness' grand jury testimony. See also R. 403-04 and 538.

Obviously doubtful that these rulings were "uniformly correct" (G. Br. p. 73), the government cites (G. Br. 73-74) other parts of the record where, it is contended, the defense did not ask whether the prosecution's witnesses had testified before the grand jury "as to particular events or episodes which had become crucial at the trial." But at most[7] of these points (R. 273-74, 288-90, 352, 623-24, 757 and 759-60) the defense was then trying to ascertain whether or not the witness had made statements to government attorneys, prior to his grand jury testimony, which might be producible under 18 U. S. C. 3500 (the "Jencks" statute). In any event, it cannot be argued that the defense should have repeatedly attempted to probe the subject matter of the witnesses' grand jury testimony, in view of the trial court's exclusionary ruling (R. 687) already mentioned.

The government also contends (G. Br. pp. 75-76) that the requests for grand jury testimony were not "appropriately limited". The requests made prior to cross examination were limited to the subject matter of the witnesses' testimony on direct examination (R. 118, 136, 448 and 487). The requests made after cross examination referred specifically to the witnesses' "testimony on direct examination on these different questions" (R. 424), to "the 1956 grand jury testimony we [*sic:* should be "he"] gave about the matters he testified to on direct examination, all by definition pertaining to Travis" (R. 427), and to "this witness's testimony before the grand jury in this court in 1956 relating to this defendant Travis and particularly as

[7] In the remaining instances cited by the government (R. 155-57, 498, and 688) the questions either were preliminary or were for a purpose other than impeachment by showing inconsistency.

to the two incidents the witness testified about, one, the Canadian trip, and, two, the talk with Travis at Travis's house in Denver in June, 1953" (R. 677-78).[8] Surely these requests were sufficiently specific.

In conclusion, the government recognizes (G. Br. pp. 79-80) that the trial court's blanket refusal of all the requests for access to or *in camera* inspection of grand jury minutes might be regarded as "an abuse of discretion on the particular facts of this case", and asks that, however that issue be resolved, the Court not impose an "automatic requirement", and that "the district judges retain a broad measure of discretion in matters of this kind." Petitioner has not asked this Court to impose any "automatic requirement", and has endeavored to describe objectively the pertinent considerations (P. Br. pp. 37-41). The burden on judges and parties will be greatly relieved if prosecution counsel can be persuaded to abandon a policy of automatic opposition to defense requests for grand jury minutes,[9] and to make them available voluntarily when there is no compelling reason to the contrary.

III. *Sufficiency of the Evidence.* As proof of the falsity of the affidavits, the government relies heavily (G. Br. pp. 17-18 and 51-52) on the witness Gardner's testimony con-

---

[8]The government acknowledges (G. Br. pp. 75-76) the particularity of this request, but argues that it related to testimony given before a different grand jury in the same court (which returned a conspiracy indictment in which Travis was again named as a defendant), and that this "is certainly a relevant factor from the standpoint of the trial court's exercise of discretion that petitioner's counsel (who was also of counsel in the conspiracy case) was seeking to breach the secrecy of grand jury testimony in a proceeding which was still in its pre-trial stages." However, the trial court explicitly stated (R. 680) that: "That factor didn't enter into my consideration in determination of the motion." See also the discussion of this point in P. Br. pp. 34-35 and 39 fn. 56.

[9]Cf. *United States* v. *Stromberg*, 268 F. 2d 256, 273 fn. 16 (C. A. 2), indicating that in that district prosecution counsel, at least sometimes, voluntarily make grand jury testimony available to the defense.

cerning his conversation with petitioner in the fall of 1951 (R. 443-44). In describing that testimony, the government declares that "petitioner admitted to Gardner his continued membership in the Communist Party", and that petitioner "confided to Gardner that his formal resignation from the Party in 1949 was not an actual resignation" (G. Br. pp. 17-18 and 51-52).

A reading of Gardner's actual testimony (R. 443-44) will readily disclose that the government's description is a gross distortion. Petitioner did not admit his "continued" membership in the Party after his "public resignation". He did not describe his resignation as being "formal". He did not "confide" to Gardner that his resignation was not actual, but stated that "the enemies of the Party" so recognized it.

On the point at issue in the trial, this testimony is inferential rather than direct. The government's maltreatment of the words used by the witness simply underlines the importance, under such circumstances, of the evidentiary requirements[10] which should have been but were not applied in this case, and the value of examining the testimony (if any) about the episode given by the witness before the grand jury.[11]

IV. *Admission of Prejudicial Evidence.* The witness Eckert's "expert" testimony that Communist Party policy was that its members could leave only by being expelled (R. 117-18) was concededly inadmissible unless there was evidence that petitioner knew of and accepted the alleged policy. The court below and the trial court thought that certain evidence about events prior to petitioner's resigna-

[10] *I.e.* the so-called "two-witness" perjury rule, and the rule against convictions based on un-corroborated admissions, discussed in P. Br. pp. 41-48.

[11] See P. Br. pp. 34-35 and 39 fn. 56.

tion from the Party established such a connection (R. 790 and 914-15).[12] The government now seeks (G. Br. p. 60) to support the connection by other means—to wit, the witness Mason's testimony that petitioner told him in July 1949 that the resignation had been "cleared" with "Ben Gold and the Party people in New York" (R. 463-64), and the witness Gardner's testimony about his conversation with petitioner in 1951 (R. 444-45).

Neither of the two episodes is evidence that petitioner knew about or accepted the Party's policy. If true, the Mason testimony suggests rather that the Party approved petitioner's resignation. And whatever construction is placed on petitioner's comments to Gardner in 1951, they have no reference to the Party's supposed "no-resignation" policy.

Even if this testimony were to be deemed sufficient to sustain the admissibility of Eckert's "expert" testimony, the jury should then have been instructed, as petitioner requested, that the testimony should be disregarded unless the jury was satisfied that petitioner knew of and accepted the Party policy (P. Br. pp. 53-54). The government makes no effort to justify the refusal of this instruction.[13]

V. *Erroneous Application of 18 U. S. C. 3500.* Petitioner contends (P. Br. pp. 59-63) that the trial court erroneously applied 18 U. S. C. 3500 in two respects. The government's answer (G. Br. pp. 69-72) confuses the rulings and portions of the record respectively pertinent to these contentions.

Petitioner's first contention is that the trial court declined (R. 151-55, 488-94, and 527) to follow the practice approved in *Palermo* v. *United States*, 360 U. S. 343, 354,

[12]The insufficiency of this evidence is discussed in P. Br. p. 54.

[13]Nor does the government deal with petitioner's other arguments (P. Br. pp. 52-55) on this point, such as the bearing of *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 414.

under which doubtful questions under 18 U S. C. 3500(e) are resolved by the trial court *in camera*. Instead, the trial court informed prosecution counsel that any documents which they produced would be regarded as within the scope of paragraph (e), and advised them not to produce any documents unless they were willing to have the documents so treated (R. 493-94). The prosecutor agreed to proceed accordingly (*ibid.*), and the record thus discloses the possibility that documents which should have been produced for *in camera* review under paragraph (e) and the *Palermo* rule, were not so produced.

The *in camera* cross-examination of the prosecution witnesses, referred to by the government (G. Br. pp. 69-71) in answering this contention, in fact had nothing whatever to do with this problem. It had to do with the other point at issue under 18 U. S. C. 3500—namely, whether "agent of the government" as used therein includes employees of Congressional committees and government attorneys. The trial court failed to rule on this issue, and the prosecution disclaimed all responsibility for ascertaining whether or not their witnesses had made any statements to such employees or attorneys (P. Br. pp. 62-63). When defense counsel then questioned the witnesses along these lines, the court decided that the questioning should be done *in camera* (R. 223-24).

The *in camera* questioning, therefore, had nothing to do with the first point under 18 U. S. C. 3500—that is, whether or not documents known by the prosecution to be in possession of the government were within the scope of paragraph (e). The questioning had to do with whether the witnesses had conferred with other government attorneys and congressional committee agents under circumstances that suggested the possible *existence* of reports that might be producible under 18 U. S. C. 3500.

Had the trial court ruled, as it should have, that the prosecution had the responsibility of producing any statements to other government attorneys or Congressional employees, just as to agents of the Federal Bureau of Investigation, the *in camera* questioning might well have been avoided. In the upshot, however, the prosecution was never called upon to state whether or not its witnesses had made producible statements to Congressional agents or attorneys, and that is the second error of which petitioner now complains.

VI. *Nos. 3 and 71, Motions for New Trial.* (A) In No. 3, the government's principal argument (G. Br. pp. 80-81) is that the comparable motion for a new trial in *United States* v. *West*, 170 F. Supp. 200 (N. D. Ohio, pending here on petitions for certiorari, Nos. 73 and 74 Misc. and No. 93), was denied after hearing. The ground of denial was that Gardner believed that his desertion from military service in 1926 was known to defense counsel in the *West* case, that therefore Gardner would have been unlikely to falsify deliberately, and that he had probably interpreted the question put to him in the *West* case as directed only to the period of the Second World War, during which he did not render military service.

The denial of the motion for a new trial in the *West* case is not, of course, *res adjudicata* as against the petitioner. But the *West* ruling is not even a valid precedent for the present case, since the record in this proceeding shows different and additional circumstances.

The record in No. 3 destroys the credibility of Gardner's explanation, embodied in his testimony during the hearing on the motion for a new trial in the *West* case. For that record shows (R. 4, 31-32, and 45) that Gardner not only falsely denied his past military service in the *West* case, but also in answer to questions put to him by

agents of the Federal Bureau of Investigation. Whatever the plausibility of Gardner's explanation of his false testimony in the *West* case, that explanation is totally inapplicable to his questioning by the Bureau. Accordingly, unlike the record in the *West* case, the record here shows that Gardner falsified his military past not once but twice, and that his explanation in the *West* case is itself, in all probability, equally false.

(B) In No. 71, the government seeks to explain (G. Br. pp. 84-85) Gardner's multiple versions of his two marriages on the ground that anyone in his situation might well have difficulty in establishing the "effective" date of his common-law marriage to his second wife. This explanation misses the point. Confusion might, to be sure, lead Gardner to give an incorrect date, but it could hardly explain his giving four different and inconsistent statements of the sequence of marital events. Nor does the government's explanation cover the discrepancies about the date of his divorce, and this was a matter that presented no unusual complications.

It is true, as the government points out (G. Br. pp. 82-83), that neither Gardner's military nor his marital history was at issue in the trial of this case. However, Gardner's testimony concerning his conversations with the petitioner is the core of the prosecution's evidence, and therefore the question of Gardner's credibility was crucial. Under these circumstances, the new evidence on which the motions in Nos. 3 and 71 were based might well have had a decisive

impact on the jury, and the denial of those motions was an abuse of discretion.

TAYLOR, SCOLL, FERENCZ & SIMON
400 Madison Avenue
New York 17, N. Y.

NATHAN WITT
P. O. Box 156
New York 23, N. Y.
Attorneys for Petitioner.

TELFORD TAYLOR,
NATHAN WITT,
KENNETH SIMON,
Of Counsel.

December 7, 1960.